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In The

Supreme Court of the United States

October Term, 1973

No. 73-381

MARSHALL WINOKUR and RAE WINOKUR, ABE BRODSKY and CELIA BRODSKY, and ETHELLE KATZ and BERTHA KATZ,

Plaintiffs-Appellants-Petitioners,

vs.

BELL FEDERAL SAVINGS AND LOAN ASSOCIATION, HOME FEDERAL SAVINGS, and UPTOWN FEDERAL SAVINGS AND LOAN ASSOCIATION OF CHICAGO,

Defendants-Appellees-Respondents.

ANSWER OPPOSING CERTIORARI

QUESTION PRESENTED.

Whether an order striking class allegations from a complaint is appealable as of right after a trial court refuses to certify the order because: discovery is virtually complete; all significant issues in the case have been briefed; almost all relevant facts are admitted; the entire case can be tried to final judgment in a matter of days (or even hours); and an interim appeal would therefore substantially delay termination of the litigation.

STATEMENT OF THE CASE.

Plaintiffs seek to represent all depositors of Home Federal Savings and Loan Association of Chicago ("Home") supposedly misled by Home advertisements. The complaint alleges the advertisements were misleading because they did not state: (1) that deposits made after the tenth of a month ("late deposits") do not begin to earn interest until the first day of the following month; and (2) that savings withdrawn before the end of a calendar quarter ("early withdrawals") do not earn interest for the calendar quarter. The parties agree on the dates, contents, and source of all alleged advertisements. They agree that the named plaintiffs made certain deposits and withdrawals on certain dates.

Defendant Home answered that plaintiffs have no cause of action on "late deposits" because every Home passbook* includes a one page statement of "conditions" which provides in pertinent part:

> Funds received on or before the [10th] [15th] of any month receive earnings for the entire month. Funds received after the [10th] [15th] receive *earnings from the first of the following month.* (Emphasis added.)

Plaintiffs admit that this language appears in every Home passbook. They further admit that currently published passbooks use "10th" and older passbooks use "15th" due to an intervening change in federal regulations and Home's charter. Plaintiffs also admit that

* Plaintiffs rely on the rule that a passbook account is a security.

they personally knew that the 10th of the month was the "determination date" during the period covered by the complaint. Finally, no named plaintiff ever made a "late deposit" in Home during the relevant limitations period.

Defendant Home further answered that plaintiffs have no cause of action on "early withdrawals" because depositors who attempt to make "early withdrawals" are advised of the opportunity to use passbook loans to avoid loss of interest, and because Home's charter clearly provided during the period of the complaint that interest would be paid quarterly. Plaintiffs did not dispute the provisions of Home's charter and admitted that they had personally been advised of the procedures for passbook loans. The only named plaintiff who deposited money in Home after reading a Home advertisement admitted under oath that she "knew if you took money out of your account before the end of the quarter . . . that you would lose interest on it." (Appellate record at 723-724)

The primary issue left for decision by the District Court thus was Home's defense that its prior disclosures barred plaintiffs' cause of action. This defense was based on *Kohler* v. *Kohler Co.,* 319 F. 2d 634 (7th Cir. 1963) and the cases collected in Annot., 22 ALR 3d 793 and footnote 2 of the district court opinion herein, A-8. All those authorities hold that a defendant has no obligation to repeat or emphasize information which has already adequately been disclosed or made accessible to a plaintiff in other ways. This issue was fully briefed by all parties and would easily and promptly have been decided by the district court but for this appeal. (Briefs comprised over 100 pages of the record on appeal.)

Plaintiffs originally sought discovery from Home concerning deposits and withdrawals by alleged class members. Discovery on these matters was deferred until the court determined whether or not a class action would lie. Now that the class action has been disallowed, such discovery is unnecessary.

For these reasons, the trial court ruled that it made no sense to allow an interim appeal. When plaintiffs sought certification under 28 U.S.C. §1292(b), the district judge held:

> Section 1292(b) . . . authorizes an immediate appeal . . . where such an appeal will materially advance the ultimate termination of the litigation. Here an immediate appeal will materially delay final termination of the litigation. The case as it now stands is virtually set for trial. Discovery, for all practical purposes, is complete. The remaining factual issues are largely uncontested and the remaining legal issues have been partially briefed. Thus an appeal in this case would delay rather than materially advance the ultimate termination of the litigation.

REASONS FOR DENYING THE WRIT.

I. THE ISSUE IS NOT RIPE FOR REVIEW BECAUSE THE LAW IS STILL IN FLUX ON THE CIRCUIT COURT LEVEL.

Six circuits have considered the appealability of orders striking class allegations. The Tenth Circuit, Third Circuit, and Seventh Circuit have squarely and unequivocally held that such orders are not "final judgments" and therefore cannot be appealed as of right under 28 U.S.C. 1291. (A-2, A-12.) All three circuits recognize that appropriate interim appeals can be taken under Rule 54(b) and 28 U.S.C. 1292(b).

The Second Circuit has gone far beyond any other circuit in permitting interim class action appeals. In its original opinion in *Eisen* v. *Carlisle & Jacquelin,* 370 F. 2d 119 (2d Cir. 1966), it created the "death knell" doctrine which allowed a plaintiff with a small individual claim to appeal dismissal of a class allegation which made prosecution of the individual claim uneconomic. In its third opinion in the same case, *Eisen* v. *Carlisle & Jacquelin,* CCH Fed. Sec. L. Rptr., ¶93,963 (1973), the Second Circuit allowed a defendant to take an interim appeal though the "death knell" rationale is obviously not applicable to a defendant.

In addition to these two disparate views on interim class action appeals, other panels within the Second Circuit have expressed disagreement with the basic approach of the *Eisen* cases. *Caceres* v. *International Air Transport Association,* 442 F.2d 141, 143 (2d Cir. 1970) argued

persuasively that the history of new Rule 23, F. R. Civ. P., showed that draftsmen of that Rule did not think that orders striking class allegations were appealable. In *Korn* v. *Franchard Corp.*, 443 F. 2d 1301 (1970), the majority opinion was critical of the *Eisen* doctrine (*id.* 1303-1306), and Judge Friendly's concurring opinion suggested that the doctrine should be reconsidered *en banc. Id.* 1307.

In addition to these post-*Eisen* cases, earlier Second Circuit cases held that an "order striking the allegations of a class action is *certainly* not appealable," *Lipsett* v. *United States*, 359 F.2d 956, 960 (2d Cir. April 1966), and that "the nonappealability of the order [striking class allegations] is *apparent.*" *All American Airways* v. *Elderd*, 209 F.2d 247, 249 (2d Cir. 1954). In *Weight Watchers of Philadelphia* v. *Weight Watchers International*, 455 F.2d 770 (2d Cir. 1972) and *Pfizer, Inc.* v. *Lord*, 449 F.2d 119, 120 (2d Cir. 1972), Second Circuit panels treated as unthinkably improper requests to appeal other interim class action rulings. The rationales of those cases are fully applicable in the "death knell" context.

Besides these conflicts within the Second Circuit, the Fifth and Ninth Circuits do not fully agree with the *Eisen* theory. In *Gosa* v. *Securities Investment Co.*, 449 F. 2d 1320 (1970), the Fifth Circuit refused to let a plaintiff appeal partly because he failed to present a sufficient record on "such matters as: how much expense should reasonably be anticipated in carrying the cause to completion; whether the degree of solvency of the named party would assure at least the payment of court costs and basic litigation expense; the likelihood of a recovery which would include attorneys fees, either directly or on a contingent basis; or the potential amounts of the claims of other class members." The Fifth Circuit explained:

> If the plaintiff wished to assert that what was otherwise *a purely interlocutory ruling* was efficiently converted by the practical circumstances of the matter to an extinction of the very right to litigate, the plaintiff had the burden of developing these facts before the trial forum.

The Second Circuit has never required such a detailed record. (No such record was made in the instant case).

The Ninth Circuit has noted the Second Circuit's "qualms about the 'death knell' doctrine" in a way that suggests that it may have similar qualms. *Falk* v. *Dempsey-Tegeler & Co., Inc.*, 472 F. 2d 142, n. 3 (1972).

If this Court were to take this case under the present state of the law, it would have to consider not one debatable rule but several amorphous variations of the same debatable rule. With the law in this developing and embryonic state, the issue is not ripe for this Court's consideration.

II. THE INSTANT CASE IS PARTICULARLY UNSUITABLE FOR CERTIORARI.

Even if the law were ripe for consideration by the Supreme Court, the instant case is the last case which this Court would want to take. The recent opinion in *Eisen* v. *Carlisle and Jacquelin* considered numerous major issues now facing the class action bar. It carried the "death knell" doctrine to its illogical extreme by allowing defendants to appeal interim class action rulings. Thus, granting a petition for certiorari in the *Eisen* case would permit this Court to consider the "death knell" doctrine as developed and defended by its perpetrator (the Second Circuit) at the same time the Court decided other issues of general importance.

Unlike the *Eisen* case, the instant case involves no detailed opinion, but a one-page order. Unlike the *Eisen* case, the judgment of the appellate court here does not consider any other significant (or even insignificant) issue.

Moreover, and signally, the factual situation in this case does not raise the "death knell" issue crisply or clearly. The district court refused to certify an interim appeal under 28 U.S.C. 1292(b) because all the issues here had been extensively briefed, almost all facts were admitted, discovery was virtually complete, and the case could be terminated in a matter of days. Thus, even under the *Eisen* rule, dismissal of plaintiffs' appeal did not sound the "death knell" of their case. Plaintiffs could easily have prosecuted this matter to a true final appealable judgment. Under the Fifth Circuit version of the "death knell" rule, quoted above, the appeal here could have been dismissed just for its inadequate record on the "death knell" issue.

A further element in this case that makes certiorari inappropriate is that defendants are savings and loan associations. Although they are confident that they will eventually win this case on the merits, they are equally confident that a notice sent to their former and present depositors, alleging fraud by defendants, would do irreparable damage to defendants' reputation and business, *without regard to the merits of the case.* Accordingly, defendants have urged from the beginning that the merits of the case be tried before any notice is sent to alleged class members. Although the district court did not rule on this issue because of its other rulings against plaintiffs, the potential hardship to defendants is a further reason for this Court to leave this case in status quo.

Conversely, denying certiorari here works no hardship on petitioners. They can bring about a consummated "final judgment" here for less than the cost of writing and printing Supreme Court briefs, flying from Chicago to Washington, preparing an oral argument, etc. (Contrast this situation to that in *Eisen* where a notice to the class and trial of the case would cost over $1 million before an appeal could be heard.) This case has been prosecuted vigorously by plaintiffs' counsel for three years. No harm will result from requiring them to spend a few more days trying the case before initiating an appellate process which itself may occupy a matter of years.

CONCLUSION.

For all these reasons, certiorari should not be granted.

Respectfully submitted,

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